# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SECOND APPEAL No. 269 of 2005

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.L.DAVE**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**THAKARDA MULAJI MADHAJI & 1 - Appellant(s)**

**Versus**

**PATEL MANILAL KARSHANBHAI & 1 - Defendant(s)**

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**Appearance :**

MR JITENDRA M PATEL for Appellant(s):1-2, 2.2.1, 2.2.2, 2.2.3, 2.2.4,2.2.5

MR DHAVAL D VYAS for Defendant(s) : 1 - 2.

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**CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**

**Date : 13/01/2006**

**ORAL JUDGMENT**

Heard, learned Advocate, Mr.J.M.Patel for the appellant and learned Advocate, Mr.Dhaval D.Vyas, appears for the respondent voluntarily.

2.Learned Advocate, Mr.Patel, submitted that the first appellate Court committed an error in interpreting document Exh.76 as a document of sale and not as a document of mortgage by conditional sale. He has taken this Court through Section 58 of the Transfer of Property Act and other relevant provisions, as well as, decision reported in case of **Chunchun Jha Vs. Ebadat Ali and Another, A.I.R. 1954 SC 345**, and submitted that this appeal may be admitted for determination of the questions suggested in paragraph No.9 of the memo of appeal.

3.This Court has taken into consideration and viewed the case from the angle suggested by learned Advocate, Mr.Patel. A look at the document in question produced at Exh.76 before the trial Court, makes it clear that it was a document of mortgage by conditional sale, where it was agreed that the appellant would repay the amount of Rs.10,000/- on or before Jeth Sudi Agiyaras of Savant Year 2034. In case of default in doing so, the respondent would be entitled to deal with the property in whatsoever manner he wants. Differently put, if the mortgage was not executed before the said stipulated date, the mortgage part would become

redundant and ineffective and sale part of that document, would become perpetually effective. This document was executed on Jeth Sud Agiyaras of Savant Year 2028 i.e. 22nd June, 1972. Thus, it was a conditional sale for a period of six years. According to the English calender, date would be somewhere in the year 1978. A suit for redemption is filed in the year 1990. The gap of 12 years is sought to be breached by saying that the mortgage was sought to be redeemed orally during this period repeatedly. But, baring oral say, there is no other supporting material and, therefore, independent of what is observed by the appellate court, it is clear that the stand taken by the appellant cannot be accepted.

4. It cannot be overlooked that this is a Second Appeal preferred under Section 100 of Civil Procedure Code and can be entertained only, if there is a substantial question of law arises for determination by this court. The appellant's case depends on interpretation of document produced at Exh.76 and oral evidence to the effect that redemption was sought before the due date. This would enter into an arena of evaluation of evidence on factual aspects, which cannot be done, as

the first appellate Court is the final Court so far as the factual findings are concerned. None of the questions suggested in paragraph No.9 (A),(B),(C) and (D) can be considered as a substantial question of law. In absence of such questions, the appeal cannot be entertained. The appeal must fail and stands dismissed. In view of the order passed in Second Appeal, Civil application No.12741 of 2005 is disposed of accordingly.

***(A.L.DAVE, J.)***

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